**KOH SIAK POO**

**v.**

**MED-BUMIKAR MARA SDN. BHD.**

HIGH COURT MALAYA, ALOR SETAR
DATO' K.C. VOHRAH J.
[CIVIL SUIT NO. 25-229-86]
27 AUGUST 1994

***CONTRACT: Hire-purchase - Breach - Repossesssion of goods - Notice of intention to repossess - Whether notice served - Whether service of notice effected in prescribed manner - Hire Purchase Act 1967 (Revised 1978) ss. 16(1), 43, 44.***

***CONTRACT: Hire purchase - Repossession - Wrongful seizure of goods by owner - Damages - Hirer claiming damages for breach of contract - Principles to be applied - Contracts Act s. 74.***

***CONTRACT: Hire-purchase - Repossession - Wrongful seizure of goods by owner - Claim for damages - Special circumstances - Hirer subjecting goods to special use - Whether hirer entitled for damages for loss of special use thereof - Whether special use and loss foreseeable - Whether special use contemplated by parties - Contracts Act 1950 s. 74.***

By a hire-purchase agreement dated 5 January 1980 the plaintiff was let a tractor by CCM for which he agreed to pay 24 instalments of RM1,200 per month. On 4 October 1981 this vehicle was seized by the defendant, the authorised agent of CCM. Shortly after that, on 12 October 1981, CCM assigned its rights under the said agreement to the defendant, who later sold the tractor off to a third party.

The evidence showed that prior to the said seizure CCM had not served the statutory notice to repossess on the plaintiff and it was not until 12 October 1981, about eight days after the tractor had been seized, that service of the Fourth Schedule Notice was effected. This notice, however, showed that as of 4 October 1981 when the vehicle was seized, there was no arrears whatever due or payable to CCM in respect of the tractor. The defendant averred that CCM had, prior to the seizure, served on the plaintiff four seperate Fourth Schedule Notices to repossess but this was denied by the plaintiff.

The plaintiff claimed for general and special damages in excess of RM500,000 as damages, *inter alia*, for wrongful seizure, for breach of contract and for loss of use of the said tractor. The facts also showed that prior to the seizure, the plaintiff had been subjecting the tractor to some special works and that as a result of the seizure, and because of the special use, the plaintiff had suffered some additional or extraordinary losses. Before the Court the main issue that arose was whether the seizure of the said tractor in the circumstances was wrongful, and if so, whether the plaintiff's entitlement to damages ought also to include the special losses as suffered by him aforesaid.

**Held:**

**[1]** The onus is on the defendant to show that the four 4th Schedule Notices of intention to repossess the said tractor, which they alleged were served on the plaintiff, had in fact been served on the plaintiff as required by s. 16(1) and that the said service was effected in the manner specified in paragraph (a) or (c) of s. 43 of the Act, that is, service either by personal delivery of the notice on the plaintiff or by registered post addressed to the plaintiff at his last known address.

**[2]** The defendant had failed to prove service of the notices to repossess. What the defendant managed to show was merely an assumption that the notices were so sent. There was no evidence shown, through the persons who handled the posting of the notices or, in their absence, for good reason, through records under s. 32 of the Evidence Act 1950, that indeed the notices were posted by registered post. Bearing in mind that the defendant had admitted that exhibit B1, the 4th Schedule Notice that was served on the plaintiff after the seizure, was in fact issued by CCM in error, it is possible that CCM may have omitted sending the other notices by registered mail as required. That being so the defendant had no right to exercise any power of repossession of the tractor and the seizure of the tractor was wrongful.

**[3]** If the plaintiff had been allowed to continue with all his instalment payments the net result would have been that the plaintiff would have become the owner of the said tractor. The loss of the right to continue hiring the said contractor until the plaintiff became owner of the said tractor was surely within the contemplation of the parties as something that would naturally result from a wrongful seizure of the said machine. The plaintiff is therefore entitled to sue for damages for breach of contract under s. 74 of the Contracts Act 1950 in respect of the loss of the right to hire the said tractor.

**[4]** The defendant, being in the business of selling tractors to persons like the plaintiff, ought to be aware that the likely result of the plaintiff being without the said tractor was that, his business involving the use of the tractor would have been adversely affected in the ordinary course of things and that he would have had to seek alternative means to overcome the loss of the use of the machine. However if the plaintiff was using the tractor under special circumstances which was not known to the defendant or in which such knowledge could not be imputed to the defendant, then the palintiff' claim for loss of such special use cannot succeed, it being something beyond the contemplation of the parties. In the circumstances the plaintiff's claim for wages paid to two drivers of a vehicle, a caterpillar shovel, which machine the plaintiff could not use because of the unavailability of the said tractor, must fail. The simultaneous use of the tractor together with the caterpillar shovel for the plaintiff's work was a special use outside the ordinary course of things, the knowledge of which could not be imputed to the defendant.

*[Judgment in part for the plaintiff].*

**Cases referred to:**
*United Manufacturers Sdn. Bhd. (In Receivership) v. Sulaiman bin Ahmad & Anor. [1989] 1 CLJ 1005* ***(refd)***
*Toeh Kee Keong v. Tambun Mining Co Ltd. [1968] 1 MLJ 39* ***(foll)***
*Hadley v. Baxendale [1854] 9 Exch 341* ***(foll)***
*Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 KB 528* ***(foll)***
*Koufos v. Czarnikow [1969] 1 AC 350* ***(cit)***
*Aruna Mills v. Dhanrajmal Gobindram [1968] 1 QB 655* ***(cit)***

**Legislation referred to:**
Contracts Act 1950, s. 74(1), (2)
Evidence Act 1950, s. 32
Hire Purchase Act 1967, ss. 16(1), 43, 44

*For the plaintiff - Mahalingam & Khor Chai Kuan; M/s. Mahindar Singh Dulkis & Co.*
*For the defendant - Jeffrey Tan; M/s. Jeffrey Tan & Co.*

a

## JUDGMENT

**K.C. Vohrah J:**

When a hirer of goods breaches a hire-purchase agreement relating to the payment of instalments of sums of money the owner of the goods may take possession of the goods if he complies with s. 16(1) of the Hire Purchase Act 1967 (Revised 1978) (the Act).

b The owner has the power to take possession of the goods comprised in the hire-purchase agreement if there had been two successive defaults of payment or a default in respect of the last payment and the owner has served on the hirer a notice, in writing, in the form set out in the 4th Schedule to the Act (commonly called the 4th Schedule Notice) and the period fixed by the notice has expired. The period shall not be less than 21 days after the service of the notice.

c The defendant had earlier sold an Ursus Agricultural Tractor (the said tractor) to Credit Corporation (Malaysia) Berhad (CCM). The plaintiff under a hire-purchase agreement (the said agreement) with CCM on 5 January 1980 was let the said tractor, where he agreed to pay RM41,800. He made a down payment of RM13,000 and agreed to pay 24 instalments of RM1,200 per month.

d Some 21 months after the said agreement was entered into, on 4 October 1981, the defendant, the authorised agent of CCM, seized the said tractor. Shortly after that, on 12 October 1981, CCM assigned its rights under the said agreement to the defendant.

The plaintiff telephoned someone in CCM and inquired from that person the reason for the seizure of the said tractor and indicated that if he was in arrears he would pay the
e arrears. According to the plaintiff he was informed that CCM was not aware of the seizure. He then wrote a letter to CCM requesting for information as to the amount due on the said tractor and another tractor which he had also taken on hire purchase so that he could settle the accounts on both tractors. Curiously, on 12 October 1981 or 13 October 1981, he was then served with a notice of intention to repossess issued by CCM. This was an undated 4th Schedule Notice (B1) showing RM1,200 as arrears at 9 October 1981
f which had to be paid on or before 30 October 1981. But it will be remembered that the said tractor was seized on 4 October 1981.

The plaintiff's complaint is that there was non-compliance with s. 16 of the said Act and therefore the seizure by the defendant was wrongful and he had been wrongfully deprived of the tractor. He claimed that he had been prevented from carrying out his work as a contractor and deprived of the profits he would have otherwise have made and
g he thereby suffered loss. He claimed for damages.

The defendant claimed that CCM (before CCM assigned its rights under the said agreement to it) had sent four 4th Schedule Notices of intention to repossess (D4A to D4D) for default payments, for arrears as at 8 August 1980, 6 January 1981, 17 March 1981 & 6 July 1981 respectively and therefore there was a proper exercise of the power
h of seizure of the vehicle.

The plaintiff denied he received any of the four notices, D4A to D4D.

Thus to the question whether the seizure was proper or wrongful, it has to be determined whether the notices D4A to D4D were served on the plaintiff, it being clear that the defendant is not relying on B1, the notice sent by CCM after seizure had been made.

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**Service of 4th Schedule Notice**

The onus is on the defendant to show that the 4th Schedule Notices of intention to repossess the said tractor, D4A to D4D, and specifically D4D, were served on the plaintiff as required under s. 16(1) bearing in mind that a 4th Schedule Notice if served on the hirer remains effective so long as the arrears of instalments including arrears of interest due on overdue instalments remain payable and unpaid and that the owner of the goods can repossess the goods (see *United Manufacturers Sdn. Bhd. (In Receivership) v. Sulaiman bin Ahmad & Anor.* [1989] 1 CLJ 1005). The service of the notice has, however, to be in the manner specified in paragraph (a) or (c) of s. 43 of the Act, either by personal delivery of the notice on the plaintiff or by registered post addressed to him at his last known place of abode or business. And s. 44 provides that the affidavit or oral evidence of an owner or his servant or agent, or of a hirer, as to the delivery, posting or service of, *inter alia*, any notice required to be served is admissible as *prima facie* proof of the service of the notice. It has to be noted that s. 44 does not purport to override the provisions of the Evidence Act 1950 as to the exclusion of hearsay evidence; it merely allows, procedurally, for the evidence as to the delivery, posting or service of any notice to be given either orally or through an affidavit by the person who himself effected the delivery, posting or service of the notice.

All notices D4A to D4D were purportedly sent by CCM. What was stated by DW2, the branch manager of CCM, was that he executed on behalf of CCM the said agreement entered into between CCM and the plaintiff. He said that notices D4A to D4D were issued by CCM to the plaintiff for the said tractor and that it was normal office procedure that whenever an account was overdue by 2 months the notice would be sent out by registered mail. It will be noticed that there was merely an assumption that the notices were so sent to the plaintiff. No evidence through the persons who handled the posting of the notices or, in their absence, for good reason, through records under s. 32 of the Evidence Act 1950, was shown that indeed the notices were posted by registered post. It has to be noted that DW2 admitted that B1, the 4th Schedule Notice issued to the plaintiff by CCM (after the tractor had been seized by the defendant), was issued in error by a clerk in CCM after the property had passed to the defendant by assignment. That is precisely the problem - CCM may have omitted sending the notices D4A to D4D by registered mail as required. If indeed they were posted by registered post the person or persons who effected the same should so state by oral evidence or through affidavits. Clearly the defendant has not discharged the onus of proof that the notices were sent to the plaintiff.

That being so, I hold that the defendant had no right to exercise any power of repossession of the tractor and that the seizure of the tractor was wrongful.

**Damages**

The plaintiff is claiming an improbable sum of over RM500,000 as damages in this case resulting from the seizure of the said tractor. The action was originally filed in the Sessions Court and amongst the prayers was one for the return of the said tractor. But it appears that when it took a long time for the case to be heard in the Sessions Court the plaintiff felt the quantum of damages was rising day by day and that the increasing amount exceeded the jurisdiction of that Court and so he had the case transferred to the High Court. The plaintiff has, however, at the trial abandoned the prayer for the return of the said tractor.

The plaintiff claimed for "general" and "special" damages and he particularised the "special damages" as follows:

**Particulars**

| | |
|---|---|
| (a) As a result of loss of use of said tractor for 11 days, wages were paid to workers at RM480 per day. | RM5280.00 |
| (b) Hire of 4 lorries at RM480 per day for 11 days | RM5280.00 |
| (c) (i) Hire of tractor at RM130 per day (from 15 October 1981 to end of 1985) | |
| (ii) Hire of tractors at RM150 per day (from January 1986 to end of 1987.) | |

Senior Counsel for the plaintiff in his submission merely relied on the losses in items (a) to (c) as set out in the pleadings as the plaintiff's measure of damages that is being claimed. In my view the plaintiff may to a certain extent rely on the loss in item (c) and he may, although he has not so claimed, legitimately claim the loss of the right to continue hiring the said tractor under the said agreement. But the plaintiff cannot claim for the losses in items (a) & (b) as such losses were not within the contemplation of the parties.

The damages claimed are based on breach of contract. The wrongful seizure of the said tractor is a breach of a term of the said contract of hire purchase as the provision under s. 16 of the said Act as to service of 4th Schedule Notices is an express provision of law and is a necessary term of the said agreement; and the plaintiff is entitled to sue for damages for breach of contract under s. 74 of the Contracts Act 1950.

Section 74 reads as follows:

> 74. (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such a compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> (3) ...
>
> Explanation - In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

It was pointed by Ong Hock Thye FJ (as he then was) in the Federal Court Case *Toeh Kee Keong v. Tambun Mining Co. Ltd.* [1968] 1 MLJ 39 at p. 40 that s. 74(1) of the Contracts (Malay States) Ordinance 1950 (the Act was known as that before its revision) is the statutory enunciation of the rule in *Hadley v. Baxendale* [1854] 9 Exch 341. His Lordship quoted the rule in the words of the English Court at p. 354 which lays down the main principles as follows:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to secure in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e. according to

the usual course of things, from such breach of contract itself, or such as may be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Ong Hock Thye FJ also adverted to another case for the more compendious terms of the rule and the restatement of the rule by Asquith LJ in *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2 KB 528, 539,

(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim v. Chicoutimi Pulp Co.* [1911] AC 301). This purpose, if relentlessly pursued, would provide him with a complete indemnity for loss *de facto* resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence,

(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

(4) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in *Hadley v. Baxendale, supra*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things,' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.

(5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parcq in the recent case of *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker* (A/B) [1949] AC 196).

(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge that defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at p. 158, if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger'. For short, we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy.

The analysis of Asquith LJ was subjected to a critical review by the Law Lords in *Koufos v. Czarnikow* [1969] 1 AC 350 but has "remained unimpaired as the classic authority on the topic" (per Donaldson J. in *Aruna Mills v. Dhanrajmal Gobindram* [1968] 1 QB 655) except on two matters, **firstly,** the reference to losses as being foreseeable should now read as referring to losses as having been in the parties' contemplation and **secondly,** the colloquialism "on the cards" is rejected.

**Loss of right to continue hiring under hire purchase agreement**

I now turn to the loss of the right to continue hiring the said tractor under the said agreement. The plaintiff was entitled to hire the said tractor under the said agreement until completion of his instalment payments under the said agreement but for the illegal seizure of the machine by the defendant. If he had been allowed to continue with all his instalment payments the net result would have been that the plaintiff would have become the owner of the said tractor. The loss of the right to continue hiring the said tractor until the plaintiff became owners of the said tractor was surely within the contemplation of the parties.

Had not the said tractor been sold by the defendant the Court would have ordered that the said tractor be returned to the plaintiff in which case the plaintiff on being returned the said tractor would have been obliged to continue paying his monthly instalments as agreed in the said agreement. The defendant has however sold the said machine and it seems to me whatever price was paid for it should represent the market value of the machine. That and less whatever the balance owed by the plaintiff under the said agreement should be the amount that should be paid back to the plaintiff by the defendant for the loss of the right to hire the said machine until such time through payment of all instalments under the said agreement he would have become owner of the said machine. The plaintiff did not adduce any evidence as to the value of the said tractor at the time of the illegal seizure. The price of the said tractor when sold after seizure was not disclosed by the defendant either. However, the defendant had valued the said tractor in the 5th Schedule Notice under s. 16 dated 21 October 1981 (see Exhibit A, p. 14) at RM25,000, and I think I can rely on that, it being the offer price of the defendant to the plaintiff who was notified that he could request the defendant to sell the machine to any cash buyer he could introduce. At that time the plaintiff owed the defendant RM23,747.94 on the hire purchase agreement (see the same exhibit under item 3, para (b)) and the plaintiff is entitled to receive the difference of RM1,252 (rounded to the nearest ringgit) between these two amounts from the defendant as one item of loss.

**Loss under items (a) and (b) remote**

The plaintiff also suffered loss as a result of being deprived of the use of the said tractor. The defendant, being in the business of selling tractors to persons like the plaintiff, would have been aware that the likely result of the plaintiff being without the said tractor was that his business involving the use of the tractor would have been adversely affected in the ordinary course of things and that he would have had to seek alternative means to overcome the loss of the use of the said machine. No evidence was adduced, and I do not think that it could have been imputed, that the defendant was aware that the plaintiff was using the said tractor under special circumstances. The claim under item (a) was for wages paid to two drivers of a vehicle, a caterpillar shovel, which could not be used because of the unavailability of the said tractor for 11 days, from the day the said tractor was seized till one day before another tractor was hired on 15 October 1981. According to the defendant the shovel machine could not be used as, "the whole work involved 3 machines and vehicles - the shovel is the first machine used to get earth and load it into the lorry. The lorry being the second vehicle will transport the earth to the place where the road is to be built. After the lorry has unloaded earth the tractor is used to push and level the earth on the road surface". The plaintiff said the amount RM480 "is the minimum cost of operating the shovel machine which includes two drivers' salaries per day as the machine used 2 drivers". These wages for 2 drivers for 11 days

may be recoverable if the defendant had been aware that the said tractor was used in a special way with two other vehicles but there is no evidence to that effect and it certainly cannot be imputed that the defendant had knowledge of these special circumstances outside the ordinary course of things and the claim under item (a) is disallowed as indeed the claim under (b) which is a claim for the cost of the hire of 4 lorries which could not be used for 11 days.

**Loss under item (c)**

The plaintiff said that 11 days after the seizure of the said tractor he managed to hire a tractor from his brother for a project at a sugar plantation at Padang Terap. He said he hired the tractor from 15 October 1981 to 31 December 1981 at RM130 per day and at RM150 from 1 January 1981 to 31 December 1987. He said he used the tractor for 24 to 25 days a month. His brother, PW2, gave similar evidence as to the rates for the hire of the tractor.

Counsel for the defendant disputed the cost for the hire of the tractor when he cross-examined the plaintiff and his brother and although the plaintiff and his brother stated they had documentary evidence to show the cost of the hire no documentary evidence was produced and these two persons were given ample time to produce the documents. I have my doubts about the rates claimed by the plaintiff and his brother and my estimate of the cost of hire of a tractor in the early nineteen eighties is that it was probably RM100 per day.

The plaintiff claimed he continued to use the tractor of his brother till 31 December 1987, a period of well over 6 years. Counsel for the defendant naturally protested at the clearly unreasonable period for the hire of an alternative tractor. It has to be stated that senior Counsel for the plaintiff did think that period as being long as well as he did state that it is difficult to determine a proper cut off point.

In my view the period of hire of the tractor from the beginning of 1982 should be excluded as the evidence of the plaintiff shows that a separate entity, a private limited company, Tong Kheng Boon Sendirian Berhad (with the defendant and his wife as shareholders) took over the contracts of the plaintiff from the beginning of 1982 and I can see no nexus between the company and the personal loss of the use by the plaintiff of the tractor that had been wrongfully seized from him. In the circumstances the claim of the plaintiff for the hire of the brother's tractor is only allowed from 15 October 1981 to 31 December 1981. Taking into account that the tractor was hired for 24 days in one month, the number of days the tractor was hired was most probably for 30 days. To this figure has to be added the 10 days the plaintiff was without a tractor starting from the day his tractor was seized until one day before he hired his brother's tractor as the plaintiff would have to be compensated for the loss of the use of the tractor for those days as well. The plaintiff is thus entitled to compensation for 40 days at RM100 per day making it RM4,000.

To sum up, the plaintiff is not entitled to the loss under items (a) or (b). He is entitled to RM1,252 for the loss of the right to continue hiring the said tractor as well as to RM4,000 for 40 days under item (c) from 4 October 1981 to 31 December 1981. Interest on judgment sum at 4% from writ of summons to date of judgment and at 8% from the date of judgment to date of satisfaction. Costs to the plaintiff.